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In the Supreme Court of the United States

OCTOBER TERM, 1997

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719, generally prohibits gaming regulated by the Act on off-reservation lands that are newly acquired by the Secretary of the Interior in trust for Indian tribes. An exception to that general bar exists, however, where (1) the Secretary determines that gaming on the lands would be in the best interest of a Tribe and its members and would not be detrimental to the surrounding community, and (2) "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A). This case presents the following questions:

1. Whether Section 2719, by requiring the Governor's concurrence as a precondition to the acquisition of trust land for specified off-reservation gaming activities, impinges upon the constitutional prerogatives of the States.

2. Whether Section 2719 unconstitutionally diminishes the President's power to execute the laws of the United States, or impermissibly delegates a federal policy decision to a state official.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 110 F.3d 688. The opinion of the district court (Pet. App. 30-57) is reported at 841 F. Supp. 1479.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1997, and was amended on June 13, 1997, in an order that also denied a petition for rehearing. Pet. App. 6-8. The petition for a writ of certiorari was filed on September 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to provide a statutory basis for the operation and regulation of gaming by Indian Tribes. See 25 U.S.C. 2702(1) and (2). Section 20(a) of IGRA, 25 U.S.C. 2719(a), establishes a general rule that "gaming regulated by this chapter shall not be conducted on [off-reservation] lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe" after October 17, 1988 (the effective date of IGRA).[1] Section 20(b), 25 U.S.C. 2719(b), establishes exceptions to that rule. The exception at issue in this case provides that the general prohibition shall not apply where

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. 2719(b)(1)(A).

2. In March 1992, petitioner Confederated Tribes of Siletz Indians of Oregon requested that the Bureau of Indian Affairs (BIA) acquire a 16-acre parcel

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[1] The Secretary of the Interior is generally authorized to acquire lands or interests in lands "within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 465. See also 25 C.F.R. 151.3(a) (governing acquisition of lands in trust for Indians).

located in Salem, Oregon, in trust for the Tribes for purposes of operating a casino. The parcel lies approximately 50 miles from petitioner's reservation. In June 1992, petitioner submitted a formal application to have the land taken in trust. The BIA requested comments on the Tribes' application from the State, county, city, and nearby Indian Tribes. The Secretary of the Interior subsequently determined that the proposed acquisition was in the best interest of the Tribes and that the acquisition would not be detrimental to the surrounding community. The Governor, however, refused to concur in the Secretary's determination and submitted objections to the proposal. On December 21, 1992, the Secretary denied petitioner's application on the ground that, absent the Governor's concurrence, the exception established by Section 2719(b)(1)(A) did not apply and Section 2719(a) precluded acquisition of the land for purposes of gaming. The Secretary noted that the land could be acquired in trust for non-gaming purposes if petitioner were to reapply. Pet. App. 11-12, 34-35.

3. Petitioner filed suit in federal district court against the United States and officials of the Department of the Interior. Petitioner sought a declaration that the gubernatorial concurrence requirement of Section 2719(b)(1)(A) is unconstitutional, and a remand of the Tribe's application to the Secretary for reconsideration in light of the requested declaration. The State of Oregon and its Governor were permitted to intervene as defendants. The State sought a declaration that the gubernatorial concurrence provision is constitutional, or, in the alternative, a declaration that Section 2719(b)(1)(A) must be invalidated in its

entirety, with the result that gaming could never be conducted on newly acquired lands. Pet. App. 32-33.

The district court denied petitioner's request for reversal and remand of the Secretary's decision and dismissed the suit. Pet. App. 28-57. The court agreed with petitioner that the gubernatorial concurrence requirement was invalid, stating that "Congress violated the Appointments Clause and general separation-of-powers principles when it granted a state governor veto power over a discretionary determination made by an agency of the Executive Branch legislatively charged with making that determination." *Id.* at 52.[2] The court concluded, however, that the remainder of Section 2719(b)(1)(A) could not function independently of the concurrence provision in a manner consistent with congressional intent.[3] The court therefore held that Section 2719(b)(1)(A)

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[2] The district court rejected petitioner's argument that the concurrence provision commanded the Governor to participate in a federal decision in violation of the Tenth Amendment. Pet. App. 43-44. The court noted that the provision "demands nothing of the Governor; all of the burdens imposed by the statute rest with the DOI. The Governor, in fact, independently exerts power on behalf of the State even through inaction: The Governor, by doing nothing, can defeat the DOI's determination in favor of granting a tribe's application." *Id.* at 44.

[3] The court reasoned that in enacting Section 2719(b)(1)(A), "Congress made the state's interests paramount by granting the Governor veto power over the DOI's determination." Pet. App. 56. The court concluded that "if only the constitutional portion of the statute were preserved"—*i.e.*, if the Secretary were permitted to acquire off-reservation lands in trust for the purpose of gaming even in the face of the Governor's objection—"the state's interest would no longer be paramount as Congress apparently intended." *Ibid.*

had to be struck down in its entirety. Pet. App. 55-57. The court accordingly denied petitioner's request for reversal and remand of the Secretary's decision, since, without Section 2719(b)(1)(A), the Secretary was barred by Section 2719(a) from acquiring off-reservation lands for purposes of gaming. See Pet. App. 12-13.

All parties appealed. The court of appeals affirmed the district court's dismissal of the suit, albeit on grounds different from those on which the district court had relied. Pet. App. 1-27. Consistent with the position of the State and the Secretary, the court held that Section 2719(b)(1)(A) does not violate either the Appointments Clause or separation-of-powers principles, and it therefore sustained the Secretary's denial of petitioner's application. See Pet. App. 10.

The court first considered the application of general principles of separation of powers. The court observed that "[c]ontingent legislation"—*i.e.*, legislation whose effectiveness is made to depend upon the occurrence of a condition precedent, such as approval by some person or persons outside the federal government—"is constitutionally acceptable in many forms." Pet. App. 17. "By placing a condition upon when and under what circumstances a provision of a statute goes into effect," the court explained, "Congress does not infringe upon the Executive's ability to execute that statute." *Id.* at 18. In a variety of circumstances, the court noted, Congress has provided that legislation will become effective only upon the occurrence of a specified contingency. *Id.* at 18-19. Those statutes include, *inter alia*, "statutes requiring approval by state courts, state legislatures, and, as in this case, state governors." *Id.* at 19. The court concluded that Congress had acted within

its proper sphere in "plac[ing] restrictions on the Executive's ability to choose which land is to be taken into trust for gaming purposes," and that the gubernatorial concurrence requirement therefore did not violate separation-of-powers principles. *Id.* at 20-21.

The court also held that the concurrence provision does not violate the Appointments Clause. The court explained that the Governor is not a federal officer and does not exercise significant federal authority. Pet. App. 22-23. Rather, the Governor acts under authority of state law, and does so only on an episodic basis. *Id.* at 23-24. The federal interest is protected by the Secretary, an Officer of the United States appointed in conformity with the Appointments Clause. *Id.* at 24. Because the court sustained the gubernatorial concurrence provision against petitioner's constitutional challenge, it did not reach the question whether that provision is severable from the remainder of the IGRA. *Id.* at 27.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7-12) that Section 2719(b)(1)(A) violates the Tenth Amendment by requiring state officials to assist in the administration of federal law. Petitioner's Tenth Amendment claim was rejected by the district court, on the ground that the gubernatorial concurrence provision does not compel States to enact or enforce a federal regulatory program, but simply gives States an opportunity to concur in a federal action that may have strong local

impacts. Pet. App. 43-44. Petitioner did not advance the Tenth Amendment claim in the court of appeals,[4] and that court did not address the issue. Because petitioner's claim was neither pressed nor passed on in the court of appeals, this Court should not consider it. See *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1, 7-8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5]

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[4] Petitioner's court of appeals brief did observe that "[u]nder the Tenth Amendment, Congress cannot compel States to regulate on the federal government's behalf." Pet. C.A. Answering/Reply Br. 33. Petitioner also asserted that "[t]he Governor cannot refuse to exercise her *federal* authority under the statute; [if] she refuses to participate in the process on Tenth Amendment grounds, Section [2719] violates that amendment." *Id.* at 34. Those assertions were made, however, as part of petitioner's argument that Section 2719(b)(1)(A) unconstitutionally vested federal authority in state officials. Petitioner did not contend that Section 2719(b)(1)(A) violated the Tenth Amendment or impinged upon the constitutional prerogatives of the States.

[5] Petitioner is, moreover, an inappropriate representative of the State's interests in this matter. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976) (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 255, (1953)). Here, petitioner seeks to vindicate the rights of the State of Oregon to be free of a purported infringement of its sovereign prerogatives. The State, however, has maintained throughout this litigation that the gubernatorial concurrence provision is valid. Petitioner, whose interests are adverse to those of the State, is not the "proper proponent[] of the particular legal rights on which [it] bases [its] suit." *Singleton*, 428 U.S. at 112. Courts "should prefer to construe legal rights only when the most effective advocates of those rights are before them," *id.* at 114, which in this case would be the State itself. Compare *Printz* v. *United States*, 117 S. Ct. 2365, 2369

In any event, Section 2719(b)(1)(A) does not infringe on any constitutional prerogative of the States. Under this Court's Tenth Amendment jurisprudence, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz* v. *United States*, 117 S. Ct. 2365, 2383 (1997) (quoting *New York* v. *United States*, 505 U.S. 144, 188 (1992)). In a variety of circumstances, however, this Court has sustained Acts of Congress that make the applicability of federal law contingent upon the content of state law or the decisions of state officials. See, *e.g.*, *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421 (1993) (upholding "federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery"); *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (upholding statute under which the federal government's provision of highway funds was made contingent on a State's prohibition of alcohol sales to persons under age 21); *Parker* v. *Richard*, 250 U.S. 235, 238-239 (1919) (upholding provision that conditioned the conveyance of certain Indian lands upon the approval of a state court); cf. *United States* v. *Sharpnack*, 355 U.S. 286, 294-296 (1958) (discussing with apparent approval various statutory provisions making the scope or effectiveness of federal law contingent upon the content of state law); *North*

(1997) (suit filed by county law enforcement officers challenging federal statute that imposed administrative responsibilities upon them). While it may be difficult to imagine circumstances under which the State or its officials would file such a suit, that unlikelihood simply underscores the fact that Section 2719(b)(1)(A) imposes no obligations upon the Governor.

Dakota v. *United States*, 460 U.S. 300, 310-316 (1983) (construing with apparent approval federal statute that makes United States' acquisition of wetlands for waterfowl production contingent upon the consent of the State's Governor). So long as "the residents of the State retain the ultimate decision," *New York*, 505 U.S. at 168, regarding the manner in which state officials will perform their functions, the potential impact of the State's decision on the administration of federal law or the conduct of federal officers cannot be said to constitute an impingement on state sovereignty.

As the district court recognized (Pet. App. 43-44), Section 2719(b)(1)(A)'s gubernatorial concurrence provision is fully consistent with established Tenth Amendment jurisprudence. Section 2719(b)(1)(A) does not require state officials to do *anything*—it simply makes the Secretary's authority to perform specified actions contingent upon the Governor's determination that those actions are in the interest of the Tribe and the surrounding community.[6] Far from

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[6] Petitioner contends (Pet. 21) that "[t]here is a total absence of state legal authority for the Governor's participation in this federal regulatory scheme," and suggests (Pet. 22) that Section 2719(b)(1)(A) could have the effect of "requir[ing] a Governor to act beyond her constitutional or statutory authority." That claim was neither pressed nor passed on in the court of appeals and is therefore not appropriate for consideration here. In any event, the claim is without merit. If state law prohibits a Governor from concurring in a proposal for off-reservation gaming, nothing in the federal statute purports to require her to disregard that prohibition. The practical effect of such a state-law rule would be to foreclose the acquisition of off-reservation trust land for gaming within the State, but the Governor's refusal to give her concurrence

undermining the "[p]reservation of the States as independent political entities," *Printz*, 117 S. Ct. at 2377, the gubernatorial concurrence provision of Section 2719(b)(1)(A) protects state prerogatives in an area where Congress recognized that States retain significant interests. See S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988) ("[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens").

2. As the court of appeals correctly held, Congress does not infringe upon presidential authority when it "places restrictions on the Executive's ability to choose which land is to be taken into trust for gaming purposes." Pet. App. 20-21. Among the conditions that Congress may permissibly impose is the requirement that Executive Branch officials obtain the consent of some person or entity outside the federal government. See pp. 8-9, *supra* (citing cases); *Currin*

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would not place her in violation of Section 2719(b)(1)(A) or any other federal law.

In the instant case, the Governor of Oregon submitted written objections to the proposed acquisition of trust land for off-reservation gaming. See Pet. App. 34-35. Nothing in Section 2719, however, requires the Governor to express any view whatever regarding a proposed acquisition. Because the Secretary is authorized to acquire off-reservation trust land for gaming "only if the Governor of the State * * * concurs," 25 U.S.C. 2719(b)(1)(A), the acquisition cannot take place if the Governor declines to address the matter. See Pet. App. 44 (district court observes that "[t]he Governor, by doing nothing, can defeat the DOI's determination in favor of granting a tribe's application for an exception to § 2719(a).").

v. *Wallace*, 306 U.S. 1, 6 (1939) (upholding provision making Secretary of Agriculture's designation of tobacco market contingent on approval by two-thirds of growers); *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 577-578 (1939) (upholding provision making Secretary of Agriculture's ability to issue marketing orders contingent upon vote of producers); cf. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 407 (1928) (Congress may make the effectiveness of federal legislation contingent upon a vote of residents in the affected district; such a provision does not constitute an impermissible delegation of legislative power) (quoted at Pet. App. 16-17). Moreover, the fact that the Governor's participation in this scheme is voluntary rather than coerced "reduces the ability of Congress to use this device as a means of reducing the power of the Presidency." *Printz*, 117 S. Ct. at 2378 n.12.[7]

3. Petitioner also suggests (Pet. 17-21) that Section 2719(b)(1)(A) may violate the nondelegation doc-

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[7] As petitioner points out (Pet. 15-16), the court of appeals was incorrect in stating that "[t]he power delegated to the Secretary to acquire Indian trust lands for gaming purposes is a legislative power." Pet. App. 20. Rather, the authority to determine whether acquisition of a particular tract "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," 25 U.S.C. 2719(b)(1)(A), is a garden variety example of executive power. Absent any conflict in authority as to the constitutionality of Section 2719(b)(1)(A), however, the court of appeals' inaccurate characterization of the Secretary's power presents no legal issue warranting this Court's review. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (the Court "reviews judgments, not statements in opinions") (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). Petitioner does not contend that such a conflict exists.

trine. Petitioner concedes (Pet. 18) that Section 2719(b)(1)(A) sets out an "intelligible principle" to guide the exercise of delegated authority, but argues that the Governor's decision may not be subject to judicial review. The question whether the Governor's decision may be subject to review in state court, while raised in the district court, was not ruled upon by that court (see Pet. App. 53) and was neither pressed nor passed on in the court of appeals. In any event, this Court's decisions upholding contingent legislation (see pp. 8-9, *supra*) have not suggested that the particular local approval must be judicially reviewable in order for the legislation to satisfy constitutional requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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